



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT 25 OF 2017

WILBERFORCE SUNDAY OJIAMBO.....COMPLAINANT

VERSUS

HENRY PETER OYUGI.....1ST RESPONDENT

THE RETURNING OFFICER, BWIRI.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

CHAIRMAN, ODM.....4TH RESPONDENT

SECRETARY-GENERAL, ODM.....5TH RESPONDENT

CHAIRPERSON, NATIONAL ELECTIONS BOARD.....6TH RESPONDENT

RULING

BACKGROUND

1. The Claimant vied for the position of Member of the County Assembly for Bwiri Ward, Busia County which were carried out on 13 April 2017 by the 3rd Respondent. The 1st Respondent contested this victory at the Busia County Appeals Tribunal (hereinafter IDR) in Busia County Petition 7 of 2017. At the IDR, the 1st Respondent called two witnesses who testified that polling in Hakati and Munyanja polling stations had been disrupted due to violence occasioned by the Claimant. The Claimant did not appear before that body. The IDR found that elections in those two polling stations were not free and fair and ordered that there be a repeat of the exercise in those two polling stations.
2. Having been aggrieved by the decision of the IDR, the Claimant approached the Tribunal under a certificate of urgency. He sought:

- a. A permanent injunction to restrain the 2nd to 5th Respondents from calling for fresh elections in Hakati and Munyanja polling stations and an order that they be ordered to re-issue the nomination certificate in respect of Bwiri Ward to the Claimant;
 - b. In the alternative, the 2nd to 5th Respondents be restrained from recalling the provisional nomination certificate issued to the Claimant or that they be restrained from revoking the said certificate; and
 - c. That the 2nd to 5th Respondents be compelled to forward the Claimant's name to the Independent Electoral and Boundaries Commission (IEBC) as the 3rd Respondent's duly elected nominee for Member of the County Assembly, Bwiri Ward, Busia County.
3. Interim orders were issued by the Tribunal on 24 April 2017 and the matter fixed for hearing on 25 April 2017. However, on 24 April 2017, Mr Makori, counsel for the 2nd to 5th Respondents and Mr Ashioya, counsel for the Claimant, recorded consent to the effect that the judgment of the IDRMC dated 17 April 2017 be set aside and that each party bear its own costs. The consent order was challenged as it had been entered without the participation of the 1st Respondent or his counsel. The application was unopposed by counsel for the 2nd to 5th Respondents but no reply was received from counsel for the claimant, who objected to the hearing notice on the basis that it was too short. In light of this, by a ruling dated 5 May 2017, this bench directed that another hearing notice be issued for 7 May 2017. Upon non-appearance by counsel for the Claimant and 2nd to 5th Respondents, the consent order was vacated and the Claimant's application dated 20 April for the above-mentioned orders was dismissed for want of prosecution. This bench then proceeded to set down the 1st Respondent's application dated 2 May 2017 for hearing.
4. Prayers 1& 2 having been dispensed with in the ruling issued on 7 May 2017, this bench proceeded to hear the 1st Respondent's application, which sought to have the 3rd to 5th Respondents restrained from issuing a nomination certificate to the

Claimant and that they be compelled to issue the same to the 1st Respondent. There was no appearance for either the Claimant or the 3rd Respondent at the hearing of 1st Respondent's application, even though it had been served on all parties.

5. Counsel for the 1st Respondent contended that the IDRМ had found that the Claimant had orchestrated acts of violence in the two contested polling stations and that it is for this reason that the IDRМ had cancelled these results. He referred to the non-appearance by the Claimant both at the IDRМ and this Tribunal as being indicative that the Claimant was not interested in resolving the matter. He termed the Claimant's actions mischievous and rehashed the 1st Respondent's prayers that the 3rd Respondent be restrained from issuing a nomination certificate to the Claimant and to issue it instead to the 1st Respondent.

ANALYSIS

6. It appears to us that the Claimant was not keen to have his dispute resolved either at the IDRМ or before this Tribunal. The Claimant contends that the decision of the IDRМ was reached without his participation, a fact which was acknowledged by the IDRМ. There is no indication that he was denied an opportunity to participate in proceedings before the IDRМ. However, the IDRМ noted in its decision that he failed to file a response to the allegations made against him.
7. In its ruling dated 7 May 2017, this bench took cognisance of the high stakes nature of electoral disputes, and was unwilling to condemn the Claimant without giving him ample opportunity to be heard. It is for this reason that we ordered that another hearing notice be issued to allow the Claimant. The Claimant still failed to appear. His absence at the hearing of the 1st Respondent's application speaks volumes. Counsel for the 2nd to 5th Respondents also failed to appear at the hearing of this application, even though he had indicated that he was not opposed to the 1st Respondent's application to set aside the consent orders of 24 April 2017. The conduct of Counsel for the Claimant and for the 2nd to 5th Respondents leaves a lot to be desired. It appears that they used this Tribunal to perpetrate a mischief by

entering a consent order to the exclusion of the 1st Respondent and failing to appear in court thereafter.

8. Turning back to the present application, Counsel for the 1st Respondent has asked this Tribunal to issue a nomination certificate to the 1st Respondent. However, we have noted that the decision of the IDRМ was for the nomination exercise to be repeated in Hakati and Munyanja polling stations, having found that the nomination exercise was not free and fair. Internal party dispute resolution processes cannot thrive if the Tribunal takes it upon itself to substitute the IDRМ decisions with its own. Since the 1st Respondent has not satisfied this bench that the decision of the IDRМ was unreasonable or given cogent reasons why it should not be allowed to stand, it appears to us that there is no reason to overturn it.

CONCLUSION

9. In light of the foregoing, the 1st Respondent’s application in terms of prayers 3 and 4 fails and is therefore dismissed no order as to costs.
10. That the decision of the IDRМ in Busia County Petition 7 of 2017 dated 17 April 2017 is upheld to the extent that there were irregularities in the two polling stations. In the circumstances, we direct the 3rd Respondent to conduct a nomination exercise for the Hakati and Munyanja polling stations in accordance with the party constitution, nomination rules and electoral laws.

Dated at NAIROBI this 8th DAY of MAY 2017

Hon. M. O. Lwanga (Presiding Member)

Hon. Desma Nungo (Member)

Hon. Paul Ngotho (Member).....

Hon. Dr. Adelaide Mbithi (Member)

